No. 12410

United States
Court of Appeals
For the Ninth Circuit

L. F. CORRIGAN, et al.,
Appellants,

vs.

SAN MARCOS HOTEL COMPANY,
Appellee.

Opening Brief of Appellants

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SUBJECT INDEX

TABLE OF CASES AND AUTHORITIES CITED

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STATEMENT RELATIVE TO JURISDICTION

The original jurisdiction of the District Court was invoked by appellants (plaintiffs below) by reason of the diversity of citizenship of the parties.

Plaintiffs, Corrigans, are citizens of Texas. (Tr. 2.) Plaintiff General Insurance Company of America is a corporate citizen of the State of Washington. (Tr. 2.) Defendant, San Marcos Hotel Company, is a corporate citizen of Arizona. (Tr. 2-3.) The amount in controversy is seven thousand dollars, exclusive of interest and costs. (Tr. 5; 7.)

When the complaint was filed July 16, 1948, the District Court had jurisdiction under Section 41(1) of Title 28, U. S. C., as it then existed. Following the effective date of the new judicial code, September 1, 1948, the jurisdiction of the District Court continued, under Section 1332 of that act. (Sec. 1332, Title 28, U. S. C.) The Court of Appeals has jurisdiction to review the judgment of the District Court, under Section 1291 of Title 28, U. S. C.

STATEMENT OF THE CASE

This action is brought under the Arizona innkeeper's liability act (Section 62-304, Arizona Code of 1939), which reads, so far as here material:

> "An innkeeper is liable for all losses of, or injuries to, personal property placed or left by his guests under his care, unless occasioned by an irresistible, superhuman cause, by a public enemy, by the negligence of the owner, or by the act of some one brought into the inn by the guest. . . . "

It is the contention of the appellants (plaintiffs below, and hereinafter referred to by name or as plaintiffs) that the appellee hotel company is liable for the loss of a fur coat belonging to the Corrigans. Defendant contended (successfully before the trial court) it was not liable, because the loss of the coat was occasioned by Mrs. Corrigan's own negligence. The issue of law presented by the appeal is whether all of the evidence, viewed in the light most favorable to the

hotel company, discloses any negligence upon the part of Mrs. Corrigan that would excuse the hotel company from the liability imposed upon it by the Arizona statute above referred to. (Tr. 109.) There is little factual dispute. These facts appear to be established by the record:

(a) General Insurance Company of America issued a policy of insurance to the Corrigans, which was in force at all times here material, whereby it agreed to indemnify them against loss or damage by theft of certain property including, among other things, a mink coat valued in the policy at seven thousand dollars, but of the approximate value of ten thousand dollars. (Tr. 18);

(b) Defendant owns and operates the San Marcos Hotel, at Chandler, Arizona (Tr. 5), where the Corrigans were winter guests for seven years. (Tr. 49-50);

(c) The hotel provided coat racks and coat hangers in the "ladies' room" or "powder room," where lady guests might leave their coats while they were eating in the dining room. (Tr. 37);

(d) During the seven years the Corrigans had spent their winters at the hotel, it was Mrs. Corrigan's custom to make use of such facilities and leave her coat in the powder room while she was eating in the dining room, and this fact was known to the hotel company. (Tr. 46);

(e) The dining room is in the main hotel building (Tr. 78) and during the winter season of 1948 the Corrigans occupied a portion of one of the hotel cottages, located some distance from such main building. (Tr. 48.) It was necessary for them and the other guests in cottages to walk outside in the open air in going from the cottage to the hotel dining room for their meals. (Tr. 68);

(f) If Mrs. Corrigan had not made use of the facilities provided by the hotel in the powder room, she might have worn her coat while eating or hung it on the back of her dining room chair. Some ladies followed the latter course. (Tr. 96-97.) However, it was the general custom for lady guests at the hotel to leave their coats in the powder room while they ate in the dining room or loafed in the lounge (Tr. 50-68) and such custom was well known to the hotel company. (Tr. 37; 97.) Mrs. Corrigan followed such general custom during all the times she stayed at the hotel. (Tr. 46.)

(g) Except upon those occasions when a public dance was given at the hotel, it did not provide an attendant in the powder room and this fact was known to Mrs. Corrigan. (Tr. 94; 19-20);

(h) At the dinner hour on February 15, 1948 Mrs. Corrigan wore her coat from the cottage to the main building. (Tr. 45.) Before going into the dining room she hung her coat in the powder room, using the facilities provided by the hotel. (Tr. 46.) After din-

ner she sat in the lounge and played "Twenty Questions" with some of the other guests and about ten o'clock went to the powder room to get her coat and discovered it was gone. (Tr. 46);

(i) At the time she left her coat in the powder room there were approximately two hundred coats there—many of them valuable furs. When she returned for it there were approximately twenty-five; Cr.

(j) The hotel company had posted and maintained a small sign in the powder room, reading "Not responsible for articles left here—San Marcos," which the trial judge found Mrs. Corrigan saw, or should have seen; (Tr. 19)

(k) The room where the coat was placed is "in the public part of said hotel" on the east side of a short hallway leading from the lobby to the dining room; (Tr. 19)

(l) Access to the powder room may be had either through the lobby, the dining room, or the kitchen, as Mrs. Corrigan knew; (Tr. 20)

(m) The trial judge found (on very flimsy evidence, as will hereafter appear) that one of the hotel company's employees had orally warned Mrs. Corrigan that the powder room was not a safe place to leave valuable articles (Tr. 20); nevertheless, the hotel company continued to maintain the coat racks there for the use of its guests (Tr. 37-46);

(n) Mrs. Corrigan did not inform any officer or employee of the hotel that she had placed, or intended to place, her coat in the ladies' room. (Tr. 20.) There were many guests and visitors at the hotel on the night the coat was stolen. Some were known to Mrs. Corrigan and some were strangers. She did not take notice of the numerous fur coats worn or carried out of the hotel by guests and visitors. (Tr. 20-21.) She knew there was a place behind the hotel desk for the safe-keeping of property of guests. (Tr. 21.)

(o) The coat was never recovered. The insurance company paid the Corrigans seven thousand dollars, under the policy above mentioned, and became subrogated to the rights of the Corrigans against the hotel company (Tr. 20) and this action was brought and prosecuted by the Corrigans for the benefit of the insurance company. (Tr. 21.)

From the foregoing facts, the trial judge concluded that Mrs. Corrigan was negligent in leaving her coat in the ladies' room and that her negligence was the proximate cause of the loss of the coat (Tr. 22) and rendered judgment in favor of the hotel company (Tr. 23-24), from which judgment and the denial of the plaintiffs' motion for new trial (Tr. 24; 29) this appeal is prosecuted. (Tr. 30).

SPECIFICATION OF ERRORS

1. The District Court erred in making its finding of fact number 4, which reads:

> "4. Plaintiff Clara R. Corrigan, while a guest at the San Marcos Hotel at Chandler, Arizona, on or about February 15, 1948, had and retained in her personal and exclusive custody and control a certain Mink fur coat of the value of approximately Seven Thousand Dollars ($7,000.00)." (Tr. 19)

for the reason that there is no evidence that Mrs. Corrigan retained the coat in her personal and exclusive custody and control; and all of the evidence in the record is contrary to such finding.

2. The District Court erred in making its finding of fact number fifteen, which reads:

> "15. Plaintiff Clara R. Corrigan did not use ordinary or reasonable care in the safekeeping of her fur coat on said day." (Tr. 21)

for the reason that there is no evidence to support such purported finding, and all of the evidence in the record is contrary to such finding.

3. The District Court erred in making its finding of fact number seventeen, which reads:

> "17. The proximate cause of the loss of Plaintiff Clara R. Corrigan's coat was the negligence of said Plaintiff, and said loss would not have occurred without such negligence." (Tr. 21)

for the reason that there is no evidence to support such purported finding, and all of the evidence in the record is contrary to such finding.

4. The District Court erred in making its conclusion of law number one, which reads:

> "1. That Plaintiff Clara R. Corrigan was negligent in caring for the fur coat which was lost and to recover for the loss of which this action was instituted, and that the proximate cause of such loss was the negligence of said Plaintiff Clara R. Corrigan." (Tr. 22)

for the reason that such purported conclusion does not state the law applicable to the factual situation presented by the record and there is no evidence in the record to support such erroneous conclusion.

5. The District Court erred in making its conclusion of law number two, which reads:

> "2. That the loss of said fur coat would not have occurred had Plaintiff Clara R. Corrigan exercised ordinary care in its safekeeping." (Tr. 22)

for the reason that such purported conclusion does not state the law applicable to the factual situation presented by the record and there is no evidence in the record to support such erroneous conclusion.

6. The District Court erred in making its conclusion of law number three, which reads:

"3. That Plaintiffs are not entitled to recover from Defendant for the loss of said fur coat, and that Defendant is entitled to judgment against the Plaintiffs on their Complaint, and for Defendant's costs incurred herein." (Tr. 22)

for the reason that such purported conclusion does not state the law applicable to the factual situation presented by the record and there is no evidence in the record to support such erroneous conclusion.

7. The District Court erred in refusing to find as a fact the matter set forth in plaintiffs' requested finding of fact number IV, which reads:

"IV. That on February 15, 1948, while the plaintiffs were guests of defendant in its hotel at Chandler, Arizona, plaintiff Clara R. Corrigan placed and left said mink coat under the care of said defendant, by leaving the same in the ladies' powder room adjacent to the dining room of said hotel, said powder room being maintained by defendant and intended by defendant for the use of its guests as a place to leave their coats and other belongings while using the facilities of the dining room and hotel. That on said date, while said mink coat was under the care of defendant, said mink coat was stolen, and it was not, and has not been recovered." (Tr. 15)

for the reason that such requested finding is material and is supported by the uncontradicted evidence on the part of the plaintiffs and the admissions made by the defendant.

8. The District Court erred in refusing to find as a fact the matter set forth in plaintiffs' requested finding of fact number V, which reads:

> "V. That at said time and place the plaintiff, Clara R. Corrigan, acted as a reasonably prudent person under the circumstances." (Tr. 15)

for the reason that such requested finding is material and is supported by the uncontradicted evidence on the part of the plaintiffs and the admissions made by the defendant.

9. The District Court erred in refusing to conclude, as a matter of law, the matter set forth in plaintiffs' requested conclusion of law number I, which reads:

> "I. That this action is controlled by the provisions of Section 62-304, Arizona Code Annotated 1939." (Tr. 16)

for the reason that the same is a correct statement of the law applicable to the facts presented by the record.

10. The District Court erred in refusing to conclude, as a matter of law, the matter set forth in plaintiff's requested conclusion of law number II, which reads:

> "II. That the loss involved herein was not occasioned by an irresistible superhuman cause, by a public enemy, by the negligence of the plaintiffs, or either of them, or by the act of someone brought into the hotel by the plaintiffs, or either of them." (Tr. 16)

for the reason that the same is a correct statement of the law applicable to the facts presented by the record.

11. The District Court erred in refusing to conclude, as a matter of law, the matter set forth in plaintiffs' requested conclusion of law number III, which reads:

> "III. That plaintiffs are entitled to recover from defendant for the loss of said fur coat the sum of seven thousand dollars ($7,000.00) for the use and benefit of General Insurance Company of America, and for plaintiffs' costs herein incurred and expended." (Tr. 16-17)

for the reason that the same is a correct statement of the law applicable to the facts presented by the record.

12. The District Court erred in rendering judgment in favor of the defendant and in denying plaintiffs' motion for new trial, because all of the evidence in the case, viewed in the light most favorable to the defendant, fails to disclose any negligence upon the part of Mrs. Corrigan that would excuse the hotel company from the liability imposed upon it as an innkeeper under Section 62-304 of the Arizona Code of 1939.

SUMMARY OF ARGUMENT

The one point urged by the appellants, as applicable to all of the errors heretofore specified, is that all of the evidence in the record, viewed in the light most favorable to the appellee, fails to disclose any negligence upon the part of Mrs. Corrigan that would excuse the hotel company from the liability imposed upon it under the Arizona innkeeper's liability act. (Section 62-304, Arizona Code of 1939.)

With the permission of the court, the argument will be presented under the following sub-headings:

1. Negligence is the failure to do what a reasonably prudent person would ordinarily have done under the existing circumstances, or the doing of that which such a person would not have done under such circumstances.

2. Negligence is always relative to the surrounding circumstances of time, place, and persons.

3. The hotel company could not limit its statutory liability by placing a sign in the powder room reading "Not responsible for articles left here."

4. An oral warning given by a hotel employee to a guest does not relieve the hotelkeeper of his statutory liability.

5. There was no duty on the part of Mrs. Corrigan to notify the hotel company she was leaving her coat in the powder room.

6. A guest has the right to rely upon prevailing custom and the hotel company is bound thereby.

ARGUMENT

1. Negligence Is the Failure to Do What a Reasonably Prudent Person Would Ordinarily Have Done Under the Existing Circumstances, or the Doing of That Which Such a Person Would Not Have Done Under Such Circumstances.

The foregoing proposition is supported by the following decisions of the Arizona Supreme Court:

Owl Drug Company vs. Crandall, 52 Ariz. 322, 80 P. 2d 952;

Southern Pacific Company vs. Buntin, 54 Ariz. 180, 94 P. 2d 639;

A. T. & S. F. R. Co. vs. France, 54 Ariz. 140, 94 P. 2d 434;

Scarborough vs. Central Arizona Light & Power Co., 58 Ariz. 51, 117 P. 2d 487, 138 A. L. R. 866.

2. Negligence Is Always Relative to the Surrounding Circumstances of Time, Place, and Persons.

In *Southern Pacific Company vs. Buntin,* 54 Ariz. 180, 94 P. 2d 639, the Arizona Supreme Court said:

> " . . . negligence is the omission to do something which a reasonably prudent man, guided by those considerations which usually reg-

ulate the conduct of human affairs, would do; or is the doing of something which a prudent and reasonable man, guided by those same considerations would not do; *it is not intrinsic or absolute, but is always relative to the surrounding circumstances of time, place and persons.*" (Emphasis supplied.)

In determining whether or not Mrs. Corrigan was negligent, we cannot be governed solely by the value of the coat which was stolen, but must refer to all the surrounding circumstances of time, place and persons. This loss occurred at an expensive resort hotel which was frequented by people of means. The place of the loss was the hotel powder room which was maintained as a place for ladies to leave their coats, and it was used for this purpose by Mrs. Corrigan. It was unquestionably the custom for the ladies who were guests of the hotel to leave their coats in this place, and it can hardly be said that Mrs. Corrigan was negligent in following this custom of many years' standing by leaving her coat in the place designated for that purpose. *If she was negligent on this occasion, so were approximately two hundred other ladies who had also left their coats, including many valuable furs, in the powder room.* Certainly Mrs. Corrigan acted as a reasonably prudent person would have acted under the circumstances. She followed the standard of conduct set by the other guests.

Not every careless act on the part of a guest may be termed negligence, as pointed out by the Supreme

Court of New Mexico, in *Landrum vs. Harvey,* 28 N. M. 243, 210 P. 104, wherein it is said:

> "The placing of rings in the pillow slip for the night cannot be conclusively called negligent. Indeed that would seem a good method of concealment and conducive to safety. Leaving them there and allowing the maid to shake out and remove the linen was careless. But was it negligence in law? If its only result was that the rings thus came to the attention of an employee, who took advantage of the opportunity and stole them, the carelessness was not the cause of the loss."

To the same general effect, the attention of the court is most respectfully invited to the early case of *Smith vs. Wilson,* 36 Minn. 334, 31 N. W. 176, which contains the following language:

> "The fact that, sleeping in a room at the hotel occupied only by himself, the plaintiff retained the sum of $495 in money secured in a belt around his body, was not such conduct as should be deemed negligence as a matter of law, although the bolt of the door to his room could be opened with a wire from the outside."

Appellants also invite the attention of the court to *Cunningham vs. Bucky,* 42 W. Va. 671, 26 S. E. 442, which thus states the rule:

> " 'Generally, and perhaps universally, he has been held to an absolute responsibility for all thefts from within or unexplained, whether committed by guests, servants, or strangers.' 'The

general principle seems to be that the innkeeper guaranties the good conduct of all persons whom he admits under his roof, provided his guests are themselves guilty of no negligence to forfeit the guaranty.' Cutler v. Bonney, 30 Mich. 259. 'Proof of the loss by the guest while at the inn is presumptive evidence of negligence on the part of the innkeeper or of his domestics. It is the duty of the innkeeper to provide honest servants, and keep honest inmates, and to exercise exact care and vigilance over all persons who may come into his house, whether as guests or otherwise. By the common law, he is responsible, not only for the acts of his servants and domestics, but also for the acts of other guests.' Jalie v. Cardinal, 35 Wis. 118. 'Neither the length of time that a man remains at an inn, nor any agreement he may make as to the price of board per day or week, deprives a person of his character as a traveler and guest if he retains his status as a traveler in other respects.' Id.

"There is no question that the plaintiff was a guest at the defendant's hotel, and that while there, he was robbed in his room while asleep, from within the defendant's family, including his servants. *That he had been drinking, was careless with his money,* and trusted in the honesty of defendant's household, and refused the services of Mrs. Bucky as to the care of his money, *will not excuse the defendant* from the dishonesty of those admitted to his employment. It was his duty to surround himself with honest servants, for the protection of the public; and he cannot excuse himself from liability by showing that the servant was

a stranger, and hired on recommendation as to good character. He should have exercised care and vigilance over wandering servants admitted to his house, and see that they did not have the opportunity to steal from his guests. As Judge Dixon says in Jalie v. Cardinal, above cited: 'If drunk, the plaintiff might still have claimed the protection of his host, as did Falstaff when he fell asleep "behind the arras," and might say with him: "Shall I not take mine ease in mine inn, but I shall have my pocket picked?" ' The plaintiff was taking his ease in his inn under the protecting aegis of his host when he had his pocket picked, evidently by a member of the defendant's household, for whose good conduct he was guarantor, and for whose malfeasance he was liable to his guests." (Emphasis supplied.)

It is also held that if the plaintiff was negligent, but such negligence was discovered by the hotel company, or its servants, in time to have prevented the loss *by the exercise of extraordinary diligence,* the hotel keeper is liable. As an example, appellants quote from *Watson vs. Loughran,* 112 Ga. 837, 38 S. E. 82, thus:

> "The main defense urged upon the trial was that, if the plaintiff's jewelry was stolen, it was in consequence of her own negligence or default, and not that of the defendants. The defendants claimed that she was guilty of such negligence or default, in that, on the day that the loss is alleged to have occurred, she left her room and the hotel, leaving open both the room door and the trunk in which was the jewelry alleged to have been stolen.

Two of the defendants' servants (chambermaids) testified, in substance, that they saw the plaintiff when she left her room on the occasion when the jewels are alleged to have been stolen, and that she left her room door open; that they called her attention to the fact and that it was unsafe so to leave it, but she hurried away, saying that her father was waiting for her, leaving the door still open. One of these chambermaids testified that they both had pass-keys at the time, with which they could have locked the door to the plaintiff's room. The other testified that the pass-keys were in the linen room, a short distance away, on the same floor, and that they got them afterwards; and that she, about an hour and a half after the plaintiff left, while putting the plaintiff's room in order, saw that the trunk was open, and, after finishing her work in the room, she came out and locked the door. Thus, from the defendants' own showing, their servants, after discovering that the plaintiff had gone off without closing and locking the door to her room, and being at once impressed with the idea that it was unsafe for her to do so, allowed the door to remain open for an hour and a half, without making any effort whatever to lock it. These servants were on the scene when the alleged negligence or default of the plaintiff occurred, and, had they taken proper precautions to protect the room and its contents, no unauthorized person could have entered it, during the plaintiff's absence, in consequence of such alleged negligence or default on her part. It did not appear when the jewelry was stolen,—whether during the time that the room door was left open, or after

it had been locked by the chambermaid,—but the defense set up was that it occurred in consequence of the plaintiff having left the door open and the trunk unlocked. Admitting the testimony of these chambermaids to be true, it was not sufficient to relieve the defendants from liability. If the plaintiff went off, leaving the door of her room open, and the theft occurred before the chambermaid locked it, and in consequence of the door being left unlocked, then the defendants would be liable, because the exercise of extraordinary diligence on the part of their servants would have prevented the loss."

3. The Hotel Company Could Not Limit Its Statutory Liability by Placing a Sign in the Powder Room Reading "Not Responsible for Articles Left Here."

The Arizona statute here applicable reads as follows:

"62-304. *Liability of innkeeper to guest.*—An innkeeper is liable for all losses of, or injuries to, personal property placed or left by his guests under his care, unless occasioned by an irresistible, superhuman cause, by a public enemy, by the negligence of the owner, or by the act of some one brought into the inn by the guest. If the innkeeper keeps a fire-proof safe, and gives notice to the guest, either personally or by putting up a printed notice in a prominent place in the room occupied by the guest, that he keeps such a safe and will not be liable for money, jewelry, documents or other articles of unusual value and of small com-

pass, unless placed therein, he is not liable, except so far as his own acts contribute thereto, for any loss of or injury to such articles if not deposited with him and not required by the guest for present use."

Such statute provides the exclusive method by which a hotel company may be relieved of liability, i.e., by maintaining a fireproof safe and posting a notice with respect thereto in the room occupied by the guest, and then he only relieves himself of his liability for the loss of "money, jewelry, documents and other articles of unusual value and of small compass."

A case quite similar to that at bar is *Maxwell Operating Company vs. Harper,* 138 Tenn. 640, 200 S. W. 515, wherein it is said:

"The petitioner operates the Maxwell House, one of the leading hotels of Nashville, and as a part of its equipment has a checkroom near the lobby, in which room the overcoats and small baggage of its guests are kept. Harper, at the time a guest of the house, deposited his overcoat in this room for safe-keeping, and received from the attendant a check, in the form of those there customarily in use, as follows:

" 'Accommodation Check.

" 'Left at owner's risk. The management will not be responsible for loss or damage. No. 4554.

(Signed) Maxwell Operating Co.'

"Harper had been a patron of the hotel for two or three years, and on numerous occasions; and on

previous visits he had been directed by the clerk and employes of the house to the checkroom as the place in which to deposit such articles. His overcoat in question here was in some way misdelivered or stolen, and he brought this suit to recover its value. Both of the lower courts have given judgment in his favor.

"The defenses of the hotel company are that it maintained a baggageroom in the basement where storage was at its risk; also a place behind the clerk's desk where articles might be left, the company assuming responsibility; and, further, that the check received by Harper operated as a contractual limitation upon its common-law liability.

"It is conceded, as it must be, that from an early day the rule in this state has been that an innkeeper is excused from liability for the loss of a guest's baggage or goods only when the loss or injury results from the act of God or is caused by the public enemy, or by the fault, direct or implied, of the guest himself. Manning v. Wells, 9 Humph. (28 Tenn.) 746, 51 Am. Dec. 688, and cases in accord.

"We hold on the facts of this case that the attempt to work an abrogation or release of this common-law liability by the handing out of the check was unreasonable.

"The storage room in the basement was for heavy baggage, and it does not appear that the equipment behind the desk was other than a safe for the keeping of valuables. By custom and previous dealings with Harper himself, he was by the

hotel company directed to the checkroom as a fit and the proper repository for his overcoat.

"Obviously, the overcoat was not a thing to be kept as a valuable in a hotel safe. 22 Cyc. 1083, and cases cited.

"A hotel which operates a checkroom in effect invites such use by its guests as Harper made of it; and the hotel company could not validly negative its common-law duty or liability by any such regulation or stipulation. The stipulation in the check was void for unreasonableness, unsupported as it was by a consideration."

4. An Oral Warning Given by a Hotel Employee to a Guest Does Not Relieve the Hotelkeeper of His Statutory Liability.

Over the objection of the appellants, the trial court found the following to be a fact, established by the evidence:

"Defendant, through its employees, prior to February 15, 1948, had verbally warned the Plaintiff Clara R. Corrigan and other guests that said public powder room was not a safe place to leave valuable articles." (Tr. 20.)

If there is any support for such finding, it is in the rather unsatisfactory testimony given by Mrs. Elizabeth Hicks, the social director employed by the hotel company, who stated:

"Q. (By Mr. Carson): Did you ever state, Mrs. Hicks, in the presence of either Mr. Corrigan or Mrs. Corrigan, or both of them, or to a group

with which they were present, that the Hotel was not responsible for wraps left there?

"A. Well, not in front of Mr. Corrigan because he didn't have access to the ladies' powder room, but Mrs. Corrigan and her friends had beautiful coats. I am not fortunate enough to have one, and I have said more than once when I have been in there, 'Well, I wouldn't leave that in here.' 'Oh, what is the difference; it is insured,' and that is their attitude out there. 'It is insured,' and it is just like people with a car, we don't care if it is stolen.

"Mr. Sutter: We object to that on several grounds; one, it is not responsive to the question, and secondly, Mrs. Corrigan has not been present in any statement made, and it is merely a voluntary statement of the witness. We move that the answer be stricken.

"The Court: She made the statement that Mrs. Corrigan was present, but she eliminated Mr. Corrigan. Did you make that statement to Mrs. Corrigan?

"Q. (By Mr. Carson): Did you make that statement in her presence, Mrs. Hicks?

"A. Mrs. Corrigan's coat was so very beautiful, everyone admired it—

"The Court: No, just answer—

"The Witness: Otherwise, I would not remember whether I said it to Mrs. Corrigan or not. It was a run of the mill understanding.

"Mr. Sutter: I don't believe the witness has still stated definitely that she made the statement to Mrs. Corrigan. I think she is assuming that

she did, because of the fact that Mrs. Corrigan had a nice coat.

"The Court: All right.

"Mr. Sutter: I renew my objection on that ground.

"Mr. Carson: Referring to these statements that you have made, Mrs. Hicks, to the various guests at various times, can you recall having made those statements or statements of similar import in the presence of Mrs. Corrigan?

"A. She would be one of the main reasons for making that statement.

"Q. Did you make that statement to her?

"A. I am quite certain that I did, because there was a certain group that have always left their coats in there before dinner and throughout the evening.

"Q. And Mrs. Corrigan was a member of that group?

"A. Yes, she was.

"Q. And in the presence of that group of which Mrs. Corrigan was a member, you have then made the statement?

"A. I certainly have." (Tr. 99-101.)

"Q. Mrs. Hicks, you stated that on occasions you had made the statement to a group of which Mrs. Corrigan was a member, that if you were there you would not leave your coat in the powder room, or words to that effect?

"A. That is right.

"Q. On what occasions did you make those statements?

"A. Before dinner, when we come from cocktail parties, before dinner when they are taking their wraps off and hanging them up.

"Q. Do you recall on what occasion Mrs. Corrigan was present when you made such a statement to that group?

"A. I have no reason to remember the date. It would be very fishy if I did. I would have no occasion to remember a date like that.

"Q. To the best of your recollection, then, you merely made the statement to a group of ladies?

"A. That is right.

"Q. And Mrs. Corrigan at one time or an other associated with that group?

"A. That is right.

"Q. Are you therefore assuming that Mrs. Corrigan was present on one of those occasions, or do you know of your own knowledge that she was present on those occasions?

"A. I am as certain as anyone could be on something that happened that has no particular significance with which it did happen, because that coat was such a beautiful coat that I know that she was among those to which I said, 'I would not leave it if it were mine.'

"Q. You are basing your recollection on her presence on the fact she had a beautiful mink coat?

"A. That is right, and she would be one of the people that I would want to be careful, and she is one of those people that have so much, is very careless because it is insured.

"Mr. Sutter: We object to that last answer and move that it be stricken.

"The Court: All right, that last observation will go out.

"Mr. Sutter: That is all." (Tr. 103-104.)

But, even assuming that such finding does have some support in the record, how can it aid the appellee?

As pointed out under the foregoing subheading numbered "3", there is an exclusive statutory method by which an innkeeper may limit his liability, or be relieved of it.

An oral warning by a social director is not mentioned or sanctioned by the Arizona statute, nor can such a warning establish negligence upon the part of guests when the hotel company itself maintained the powder room and provided the coat hangers and racks therein and knew of the custom on the part of guests for many years to leave valuable coats in such room.

The trial judge erred when he adopted the standard of conduct fixed by Mrs. Hicks, rather than the standard of conduct fixed by other guests similarly situated and in similar circumstances to the Corrigans.

The hotel company felt there was no danger in the leaving of coats in the powder room, except when "public dances" were given at the hotel. Then it employed an attendant to guard the coats. Mr. John Quarte, general manager of the hotel, testified:

"Q. Is that powder room attended during meal hours?

"A. The powder room is never attended. The only time we attend that, put an attendant in the powder room, is when we have a public dance, we have three or four dances during the season, and that is the only time we have an attendant, but for daily use of the guests, daily use, we do not have attendants." (Tr. 94.)

5. There was No Duty on the Part of Mrs. Corrigan to Notify the Hotel Company She was Leaving Her Coat in the Powder Room.

Appellee knew that guests customarily left their coats in the powder room. Mr. John Quarte, the general manager of the hotel, testified:

"Q. Mr. Quarte, in connection with the hotel, there is a dining room operated, is there not?

"A. That is right.

"Q. Does the Hotel provide any facilities for the use by patrons of the dining room and guests of the hotel that use the dining room in the way of a place for guests to leave wraps?

"A. We have a room connected with the ladies' powder room where guests choose to leave their wraps on occasions.

"Q. In the ladies' powder room are there any facilities particularly designed for that purpose?

"A. There is a coat rack there for those wishing to leave their wraps or things.

"Q. Is that a long horizontal bar on a stand?

"A. Yes, it is about seven feet wide—long, I should say.

"Q. On that did you have individual coat hangers for the use of the guests?

"A. Yes." (Tr. 37.)

"Q. Do all of your guests always leave their wraps in the powder room whenever they go into the dining room?

"A. No, sir; some do and some don't. Some take them right in the dining room with them, and hang them over the chair while they are having their dinner.

"Q. After the guests leave the dining room, do some of them who sit in the hotel lobby for a time after their meal always leave their coats in the powder room?

"A. No, sir. Quite a few of them take them out and wear them in the lobby, due to the drafts with the doors opening and closing, and so on. Quite a few take their coats out of the powder room." (Tr. 96-97.)

Guests occupying the hotel cottages, as the Corrigans did, and who wore their coats when walking outside from the cottage to the dining room, then had their choice, according to Quarte, of hanging their coats on the back of their dining room chair or placing them in the powder room on the rack provided by the hotel.

A case somewhat in point is *Swanner vs. Conner Hotel Company,* decided by the Springfield (Mo.) Court of Appeals, and reported in 224 S. W. 123, wherein it is said:

"Plaintiff, a traveling salesman, went to the Conner Hotel in Joplin about 11:30 a.m. on a certain day in May, 1919, to obtain a room as a guest. He was familiar with the hotel, having worked prior to that time for a taxicab company that had a stand in the hotel. On entering the hotel plaintiff went directly to the bell boys' bench, where it was the custom to leave grips, and set his grip by the bench. On previous occasions when plaintiff was a guest at this hotel he had seen the bell boy set his grip by this bench, and had seen the grips of other guests set by this bench. He then went to the desk and asked for a room, and there was no room vacant. He afterwards ate lunch in the hotel. After lunch plaintiff went away, but returned about 5:30 p.m. No room was vacant then, but would be 'before the evening was up.' After 10 p.m. plaintiff succeeded in getting a room, registered, looked for his grip, and it was gone. None of the bell boys handled his grip or knew it was there so far as the record shows. He did not call the attention of any one connected with the hotel that he had a grip. He merely went in and set his grip where he knew it was the custom to set grips while the guest was registering and securing a room. The defendant maintained a check room in the hotel, and plaintiff knew of this fact, and knew where it was. He could have checked his grip without cost, and without inconvenience, as the check room was near the clerk's desk, and only about 20 feet from the place where plaintiff set his grip. An attendant was in the check room at the time plaintiff entered the hotel, and at all other times, ready to check plaintiff's or any other

guest's grip. Plaintiff never looked for his grip, nor gave it any attention from the time he set it down until after 10 o'clock that night. . . .

"Defendant urges that plaintiff's baggage was never *infra hospitium,* that is, in the care and under the custody of the innkeeper, and that therefore no liability attached. As stated, the fact that plaintiff was a guest is not questioned. He had put his baggage where it was customary to put baggage while a guest was registering and seeing about a room. Plaintiff did not register immediately after setting his grip by the bell boys' bench, but would have then had there been a room. He was told there would be a room, and he waited for the room. His baggage was where it should have been at least up to the time he asked for and failed to get a room."

Judgment in favor of the traveling salesman was, accordingly, affirmed.

6. A Guest Has the Right to Rely Upon Prevailing Custom and the Hotel Company Is Bound Thereby.

If Mrs. Corrigan had taken her coat into some cheap hotel on skid row and left it in an unattended room, appellants might be able to agree with the appellee and the trial judge that she was guilty of negligence.

The same conduct at the San Marcos, however, does not constitute negligence. She had left her coats in the powder room over a period of seven years, without mishap. The other lady guests did the same thing.

It was a general custom upon which she had the right to rely.

While the record does not so disclose (because the trial judge was thoroughly familiar with the situation) the San Marcos is admittedly one of the nicest winter tourist hotels in the southwest. About the only time common folks are able to partake of its hospitality is at the close of the tourist season, when for two days the State Bar of Arizona holds its annual convention at the hostelry.

(Through that medium, even the authors of this brief have had a chance to observe the interior of the establishment.)

A case recognizing the distinction between conduct required in an expensive hotel, as contrasted with a cheaper one, is *Burton vs. Drake Hotel Company,* 237 Ill. App. 76.

It is submitted that Mrs. Corrigan had the right to rely upon the general custom followed by the other guests, and by her over a long period of time, of leaving her coat upon the hanger provided by the hotel in the powder room furnished and maintained by the hotel. While not precisely in point, it is felt the decision in *Keith vs. Atkinson,* 48 Colo. 480, 111 P. 55, may be of some assistance to the court, for in that case it is said:

> "And, under the circumstances of this case, if such a system or custom was in general use, and

such an undertaking was consistent with what a traveling guest had a right to expect in accordance with the rules and usage prevailing generally at similar hotels, and no notice was brought to the attention of the guest to the contrary, then he was justified in making such disposition of his check, and should have been allowed to show that such a general usage and custom prevailed."

CONCLUSION

For the reasons above given, it is most respectfully insisted that the cause should be reversed, with instructions to the District Court to enter judgment in favor of the plaintiffs, as demanded in the complaint.

Respectfully submitted,

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